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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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| OLIVIA SCHREINER and JAMES SCHREINER, individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>PATRIARCH PARTNERS, LLC and AMERICAN LAFRANCE, LLC,<br><br>Defendants. | No. 2:14-cv-220-RMG<br><br>**ORDER** |

Defendant Patriarch Partners has filed a Motion to Dismiss for Lack of Personal Jurisdiction on September 15, 2014 (Dkt. No. 59). For the reasons stated below, the Court DENIES Defendant's motion.

## I. Background

Plaintiffs are former employees of Defendant American LaFrance LLC ("ALF") who worked at its facilities located in Moncks Corner, South Carolina for approximately 10 years. (Dkt No. 17 at ¶ 6.) The named plaintiffs allege that they were terminated without cause and without advance notice on January 17, 2014, because the facilities closed. *Id.* at ¶¶ 1, 6. Plaintiffs assert that ALF and Patriarch Partners, LLC (as a single employer) were subject to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* ("WARN Act"), and that its employees were therefore entitled to certain protections, including advance notice of termination. Plaintiffs further allege that Patriarch Partners owns and controls ALF, and bring this suit against both defendants on behalf of themselves and similarly situated individuals for sixty days of unpaid wages and benefits. (*Id.* at ¶ 1.)

At this point in litigation, the main question in dispute concerns the relationship between Patriarch Partners and ALF, and potentially hundreds of other entities, all of which are owned and controlled by one person, Lynn Tilton, who, among her many roles, is the CEO of Patriarch Partners and was and is the sole board member and manager of ALF.

Plaintiffs filed suit on January 24, 2014, and Patriarch Partners filed a Motion to Dismiss for lack of personal jurisdiction (Dkt. No. 9) on February 25, 2014. Plaintiffs amended their complaint on March 21, 2014, addressing many of the issues raised in the Motion to Dismiss, and on April 30, 2014, Patriarch Partners filed a new Motion to Dismiss (Dkt. No. 23). The motion argued that Patriarch "does not own, manage, or control ALF" and that Patriarch is merely an investment fund manager that manages loans to its "portfolio companies," one of which is ALF. (Dkt. No. 23 at 8). Patriarch Partners also asserted that it is not registered to do business in South Carolina and does not solicit business, advertise, file taxes, or maintain a location in South Carolina, and that it has no agents, subsidiaries, or representatives of any nature in South Carolina. (Dkt. No. 23-1 at 5-6). Tilton has testified that Patriarch "does not manage or control ALF," that "Patriarch played no role in ALF's decisions regarding the alleged layoffs," and that "Patriarch is not an agent, servant, joint venture partner, or employee of ALF." (Dkt. No. 9-2 at 2).

On June 2, 2014, the Court issued an order declining to find general jurisdiction because, under Supreme Court law, Patriarch Partners cannot be "fairly regarded as at home" in South Carolina. (Dkt. No. 30 at 8). Parties were allowed jurisdictional discovery to investigate the nature of Patriarch's contacts with South Carolina, and Patriarch's motion to dismiss was dismissed without prejudice.

The parties do agree that Patriarch manages assets invested in four funds that are the members of ALF. (Dkt. No. 23-2 at ¶¶ 5, 7; Dkt. No. 17 at ¶ 23). Those funds were organized by Tilton, who also makes up the entirety of their membership, either personally or through a trust, (*Id.* at ¶ 23-24), and Tilton, either through Patriarch Partners or independently owns and controls all the entities involved in the corporate scheme.

Patriarch is a private investment firm that manages several investment funds, including the four entities that were the members of American LaFrance and funded it during the period of Tilton's leadership of the company (Dkt. No. 23-2 at ¶ 4). Patriarch selects the assets purchased by the investment funds, including majority equity stakes in certain "portfolio companies." (Decl. of Lynn Tilton, Dkt. No. 9-2 at 1-2). These funds are collateralized loan obligation investment vehicles ("CLOs") organized under the laws of the Cayman Islands and were originated and organized by Patriarch's CEO Tilton. (Dkt. No. 17 at ¶ 23; *see also* Dkt No. 23-2 at ¶ 7). Zohar Holding, LLC ("Zohar") owns 100% of the assets of these CLOs. (Dkt. No. 17 at ¶ 28). Zohar has two members: Tilton and an irrevocable trust for Tilton's daughter of which Tilton is the trustee. (*Id.* at ¶ 24).

Because the CLOs have no employees, Tilton and/or Patriarch have formed other companies to perform particular services. (Dkt. No. 17 at ¶¶ 24-29). Each CLO has a separate Patriarch LLC ("Patriarch Partners [insert appropriate Roman numeral], LLC") to act as collateral manager or investment advisor. (*Id.* at ¶ 24). Patriarch Partners Management Group, LLC (PPMG) has provided management and executive services to American LaFrance ("ALF") (Dkt. No. 23-2 at ¶ 8; Dkt. No. 17 at ¶ 76). The sole member of each of these Patriarch LLCs, including PPMG, is Zohar (with Tilton and Tilton's trust as its members). Tilton is the manager of all of them. (*Id.*). The question before the Court is whether Patriarch Partners, which appears to act as Tilton's main base of operations, has had contacts with South Carolina, either of its own or through ALF acting as its agent, sufficient to support specific jurisdiction in this forum. The Court finds that Plaintiffs have established a basis for personal jurisdiction both through a traditional specific jurisdiction analysis and under an agency theory.

## II. Discussion

### A. Burden of Proof

When a court's personal jurisdiction is challenged, the burden is on the plaintiff to establish that a ground for jurisdiction exists. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989). When the court resolves the motion on written submissions (as opposed to an evidentiary hearing), the plaintiff need only make a "prima facie showing of a sufficient jurisdictional basis." *Id.* However, the plaintiff's showing must be based on specific facts set forth in the record. *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992). The Court may consider the parties' pleadings, affidavits, and other supporting documents but must construe them "in the light most favorable to plaintiff, drawing all inferences and resolving all factual disputes in his favor, and assuming plaintiff's credibility." *Sonoco Prods. Co. v. ACE INA Ins.*, 877 F. Supp. 2d 398, 404-05 (D.S.C. 2012) (internal quotations omitted); *see also Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir. 2003) ("In deciding whether the plaintiff has made the requisite showing, the court must take all disputed facts and reasonable inferences in favor of the plaintiff."). However, a court "need not credit conclusory allegations or draw farfetched inferences." *Sonoco*, 877 F. Supp. 2d at 205 (internal quotes omitted).

As an initial matter, Patriarch argues that the completion of jurisdictional discovery should raise the legal standard, requiring Plaintiffs to prove that personal jurisdiction is appropriate by a preponderance of the evidence, rather than requiring only a *prima facie* showing. *Combs*, the controlling Fourth Circuit case on this matter, distinguishes between personal jurisdiction decisions made based on motion papers (which compel only a *prima facie* standard) and those based on an evidentiary hearing or trial (which revert to the preponderance of the evidence standard); it does not address the question of whether jurisdictional discovery makes the Court's consideration more like an evidentiary hearing and changes the burden of proof. In any case, Plaintiffs here meet both standards and the distinction is academic for present purposes.

**B. Legal Standard**

To meet their burden, Plaintiffs must show (1) that the exercise of jurisdiction is authorized by the long-arm statute of the state and (2) that the exercise of personal jurisdiction complies with the constitutional due process requirements. *E.g., Christian Science Bd. Of Directors of First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 215 (4th Cir. 2001). South Carolina has interpreted its long-arm statute to extend to the constitutional limits of due process. *See Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 130-31 (S.C. 1992). Thus, the first step is collapsed into the second, and the only inquiry before the court is whether the due process requirements are met. *ESAB Group, Inc. v. Centricut, LLC*, 34 F. Supp. 2d 323, 328 (D.S.C. 1999); *Sonoc Products Co. v. Inteplast Corp.*, 687 F. Supp. 352, 352 (D.S.C. 1994).

Due process requires that a defendant have sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken* *v. Meyer*, 311 U.S. 457, 463 (1940)). This standard can be met in two ways: "by finding specific jurisdiction based on conduct connected to the suit or by finding general jurisdiction." *E.g., ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711-12 (4th Cir. 2002) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Having determined that Patriarch does not have the requisite continuous operations within South Carolina to support general jurisdiction, the Court now turns to the evidence presented on the question of specific jurisdiction. To determine whether specific jurisdiction exists, the Court considers "(1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the state; (2) whether the plaintiffs' claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally 'reasonable.'" *E.g., Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003) (citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711-12 (4th Cir. 2002); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n. 8 (1984)). In addition, even in the absence of direct activity in the forum state, the actions of one party may be imputed to another if it has acted as an "agent" of the nonresident party. "Agency must be proved by the party asserting the relationship exists," and is generally determined "by evaluating the amount of control and supervision exercised by one entity over another." *Hammond v. Honda Motor Co., Ltd.*, 128 F.R.D. 638, 643 (D.S.C. 1989); *see also Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 61 (4th Cir. 1993) (agency test applied by Maryland courts "allows a court to attribute the actions of a subsidiary corporation to the foreign parent corporation only if the parent exerts considerable control over the activities of the subsidiary").

South Carolina courts have considered four factors in this control analysis: "(1) common ownership, (2) financial independence, (3) degree of selection of executive personnel and failure to observe corporate formalities, and (4) the degree of control over marketing and operational policies." *ScanSource, Inc. v. Mitel Networks Corp.*, 6:11-cv-382, 2011 WL 2550719 at * 6 (D.S.C. June 2011) (citing *Builder Mart of Am., Inc. v. First Union Corp.*, 563 S.E.2d 352, 358 (S.C. Ct. App.2002)).

**A. Patriarch's Contacts with South Carolina**

Plaintiffs have submitted documentation of a number of actions that Patriarch took in or directed at South Carolina, and it is unnecessary to reproduce the list in full here. A short review is sufficient to show the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the state, that the plaintiffs' claims arise out of those activities directed at the state, and that the exercise of personal jurisdiction would be constitutionally reasonable. In fact, a single contact may be sufficient to give a forum personal jurisdiction over the defendant when the contact gives rise to the cause of action under consideration. *E.g.*, *C.B. Askins v. Firedoor Corp. of Fla.*, 281 S.C. 611, 616 (1984); *Hardy v. Pioneer Parachute Co.*, 531 F.2d 193, 195 (4th Cir. 1976); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). *Brower v. Blitch*, No. 9:14-CV-306-DCN, 2014 WL 1373753, at *2 (D.S.C. Apr. 8, 2014). Taken together, the continuous and purposeful actions taken by Patriarch Partners in and directed at South Carolina easily meet the standards for specific jurisdiction established by the Supreme Court in *Helicopteros* and the Fourth Circuit in *Carefirst*.

Patriarch Partners first became connected to ALF at some point after December 2005, when, according to news reports, it acquired ALF. Tilton explains in her affidavit that this was an inaccurate description, and that ALF's members, which she controls owns and controls, and which do not have employees, took over ALF, and she became ALF's sole manager and sole member of its board of directors. She states that the members then made loans to ALF, with collateral management services (managing and monitoring the loans) provided by Patriarch. (Dkt. No. 59-2 at 6). She, and Patriarch Partners, therefore assert that she retained all decisionmaking authority (as described by an "authority matrix" apparently prepared for this litigation) and exercised it with respect to ALF, completely independently of her role as Patriarch Partner's CEO. Regardless of the details of the acquisition, once Tilton was in charge of ALF, it is clear that Patriarch Partners, as an entity, played an important role in supervising, funding, and running the newly obtained company. ALF's former CEO testified that his "channel to get approval or lack of approval or direction on the issues that [he] served up" was through Scott Whalen, a Director at Patriarch Partners. The director of purchasing at ALF also explained that he followed direction from Whalen as to ALF's operations, and both individuals confirmed that Patriarch, as the manager of the entities that were members of ALF, made decisions about whether the company would receive infusions of cash from new loans. Since ALF ran at a loss for most if not all of the relevant time period, such cash flow was critical to its continued operations.

Patriarch also regularly flew potential ALF executive hires to New York to be interviewed by Patriarch staff, then sent them to South Carolina to carry out their duties as ALF employees. According to deposition testimony and emails from within Patriarch, the last CFO at ALF, hired by Patriarch Partners with no input from ALF management, was essentially hired to manage an exit strategy for Tilton to sell ALF. Notes on that CFO's resume from Patriarch Partners staff state that he is "intrigued and engaged regarding the task at ALF, but most important excited about the opportunity to join Patriarch Partners." Tilton's emails regarding this hire, as well as a number of other decisions regarding ALF, were tagged with her signature block as head of Patriarch Partners.

More recently, in August 2014, Patriarch sent an employee of another "portfolio company" to South Carolina to assist with the inventorying and auctioning of assets held by ALF, and instructed the auction company to send all proceeds to "Iconic American Trucks, LLC c/o Patriarch Partners, LLC" in New York. Iconic American Trucks, LLC was formed and registered by Tilton two days after the shutdown of ALF. (Dkt. No. 69 at 2). Unsurprisingly, another entity formed and owned by Tilton, "Patriarch Partners Agency Services, LLC," or "PPAS", serving as an agent for the four members/lenders who held the funds that owned ALF, was the company that actually foreclosed on ALF's loans and transferred ALF's assets to Iconic American Trucks, Inc. But because PPAS does not have any employees, Patriarch Partner employees conducted this business.

Patriarch correctly argues in its motion to dismiss that the "authority that Ms. Tilton possessed in her capacity as ALF's Manager cannot be imputed to Patriarch." (Dkt. No. 3). However, such imputation is unnecessary because Patriarch itself, through other employees and actions, had more than enough contacts with South Carolina to make it subject to personal jurisdiction here in compliance with its Due Process rights. Patriarch does not dispute that the company placed the CLOs' funds in ALF, it hired and fired ALF's upper level employees, it managed the ongoing planning, reorganization and financing of ALF, and after ALF finally folded, its assets were auctioned off and the proceeds mailed to Patriarch for redistribution to another portfolio company. Tilton's declaration also notes that employees of Patriarch's other portfolio companies sometimes provided services to ALF, including management services.

Patriarch, in other words, clearly availed itself of the privilege of conducting activities in the state. Plaintiffs' claims, relating to their treatment in the aftermath of ALF shuttering its factory doors, arise from the activities directed at South Carolina, and the exercise of personal jurisdiction violates no notion of fair play and substantial justice sufficient to raise a Due Process question.

Finally, Plaintiffs have presented a long litany of press reports and online sources, including some from Patriarch's own website, which refer to Patriarch as "owning" ALF, managing it, or otherwise being closely intertwined with its business in South Carolina. Even assuming Patriarch is correct that each of those sources was wrong or mischaracterized its operations in the state, it is obvious that Patriarch prides itself on investing in, and turning around, distressed companies throughout the country. *See, e.g.* Patriarch's website's "About Us" section ("Patriarch focuses on the acquisition and invigoration of undervalued iconic American brands where time, capital and sound strategy can rescue a business and restore value, creating and preserving jobs in America. The firm is devoted to rebuilding America one company at a time, one job at a time.") Having made the decision to put such efforts into an enterprise in South Carolina, and having then decided to close the enterprise and sell its assets, it hardly offends "notions of fair play" for the Court here to exercise personal jurisdiction over the company for purposes of resolving a resulting dispute with the now-jobless former workers from that enterprise. The constitutional analysis of personal jurisdiction is intended to protect "a party from litigation so gravely difficult that [the] party unfairly is at a severe disadvantage in comparison to [its] opponent." *Grayson Consulting, Inc. v. Cathcart,* No. 2:07-CV-00593-DCN, 2013 WL 6490175 (D.S.C. Dec. 10, 2013).

**B. ALF and Patriarch's Agent/Principle Relationship**

Plaintiffs also argue, and the Court agrees, that specific jurisdiction over Patriarch is appropriate due to its control over ALF, and ALF's resultant status as an agent of Patriarch. Agency must be shown by the party asserting it exists, in this case Plaintiffs, and is generally determined "by evaluating the amount of control and supervision exercised by one entity over another." *Hammond v. Honda Motor Co., Ltd.*, 128 F.R.D. 638, 643 (D.S.C. 1989); *see also Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 61 (4th Cir. 1993) (agency test applied by Maryland courts "allows a court to attribute the actions of a subsidiary corporation to the foreign parent corporation only if the parent exerts considerable control over the activities of the subsidiary").

South Carolina courts have considered four factors in this control analysis: "(1) common ownership, (2) financial independence, (3) degree of selection of executive personnel and failure to observe corporate formalities, and (4) the degree of control over marketing and operational policies." *ScanSource, Inc. v. Mitel Networks Corp.*, 6:11-cv-382, 2011 WL 2550719 at * 6 (D.S.C. June 2011) (citing *Builder Mart of Am., Inc. v. First Union Corp.*, 563 S.E.2d 352, 358 (S.C. Ct. App.2002)). Patriarch argues that a fifth factor should be implied, that of a "parent-subsidiary relationship." (*E.g.* Dkt. No. 59 at 12-14). It notes that in "this District, the doctrine is rarely, if ever, applied outside that context," (*Id.* at 14), and that therefore applying agency theory on these facts would extend the doctrine "beyond constitutional limitations." Patriarch's analysis on this point is overly narrow.

As the Supreme Court explained in a recent case, "Agencies . . . come in many sizes and shapes: 'One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 (2014) (citation omitted).

Patriarch cites to a number of cases in this District that analyzed parent corporations for an agency relationship with their subsidiaries, but these cases do not prove its point that the agency theory may *only* be applied in that context. The fact that the parent-child corporate structure is one that inherently formalizes control of one entity by another makes it a relationship that is commonly discussed in the context of agency-based personal jurisdiction. This does not make such a structure necessary to the formation of an agency relationship, and Tilton's decision to choose an alternate structure for her business and financing activities does not, in the Court's view, alter the reality that Patriarch Partners functioned as the locus of control for ALF decisions and financial viability.

In its motion to dismiss and its reply brief, Patriarch essentially argues that Patriarch Partners was merely an advisor to ALF, and that any seeming overlap between Patriarch's activities and ALF's trajectory as a business (in terms of its finances, management, and eventual closure) is an illusion created by the fact that Tilton acted as the head of both entities. Patriarch explains that Patriarch's advisory role, as well as certain employment and other services, were provided pursuant to "arms-length" agreements between ALF, Patriarch, and certain other portfolio companies. The reply brief in particular emphasizes that "[n]one of the loan documents showed any loans from Patriarch to ALF . . . The record definitively establishes that ALF's members made secured loans to ALF, not Patriarch." Tilton and Patriarch also rely on an "authority matrix," which is a written document describing the decisionmaking authority Tilton claims was used at ALF. The authority matrix delegates all business decisions to a "Designated Executive" (unnamed) or to the "full Board," which consists solely of Tilton.

These efforts to keep Tilton's business at ALF separate from Patriarch may have been well intentioned, but it appears that they were ultimately unsuccessful. Tilton regularly discussed and made major ALF decisions with Patriarch's employees, rather than with ALF's leadership. As discussed above, ALF consulted with and received approval from Patriarch for its funding and some hiring decisions, and other hiring decisions were made without any involvement from ALF at all. It may be true, as she testified at deposition, that Tilton herself made the decision to close ALF, solely in her capacity as ALF's Manager (Dkt. No. 59-2 at 9). However, she did not effectuate the closure through her own actions; she accomplished it through the Patriarch Partners staff, resources, and structure in New York.

Olindo Malizia, the former CEO of ALF, has also referred to Patriarch Partners as "the equity owner of ALF," and stated that it "shut down ALF on January 17, 2014." (Dkt. No. 48 at 1). And again, media reports and Tilton's own statements in unrelated proceedings strongly imply that Patriarch provided the structure through which Tilton managed the portfolio companies, including ALF.

As to the factors in the agency control analysis, the parties agree that Patriarch and ALF were both owned by Tilton, and the first factor, common ownership, therefore presents no dispute. Patriarch argues that ALF was financially independent because it maintained separate books and operations. But Tilton's declaration concedes that "[i]n performing its collateral management services (e.g., managing and monitoring the secured loans made by the funds), Patriarch requested and received financial reports from ALF, updates on ALF's business and strategic planning, revenue and cash flow projections, and budgets. In recent years, Scott Whalen, a Vice President of Credit at Patriarch, was ALF's principal contact on these matters. Patriarch also assessed ALF's requests for additional funding by its members." Then, since those members had no staff members of their own, and since Patriarch managed their investments, Patriarch decided whether to grant such additional funding. ALF may not have been a subsidiary of Patriarch, but it certainly did not have "financial independence" from Patriarch. The degree of selection of executive personnel has already been discussed above. The only consideration that might give pause is the question of whether Patriarch had "control over marketing and operational policies." However, the operations described by Plaintiffs upon the ALF shutdown, auctioning, and asset transfers (Dkt. No. 69 at 28-34) show a great degree of control over the operations of ALF throughout the closing process.[1] These actions, taken with the former ALF executives' testimony that their operational and financial decisions were subject to review by Patriarch, is sufficient to show with at least a preponderance of the evidence that ALF acted as an agent of Patriarch during the period leading up to and including its demise.

## III. Conclusion

For the reasons stated herein, the Court finds that personal jurisdiction over Patriarch Partners is appropriate. Defendant's Motion to Dismiss (Dkt. No. 59) is therefore **DENIED**.

**IT IS SO ORDERED.**

Richard M. Gergel
United States District Judge

November 7, 2014
Charleston, South Carolina

[1] One particularly compelling example of this control includes an email from an ALF employee announcing to the CFO that "[a]ll of the cash in the ALF accounts was removed Monday night by [Patriarch Partners]" and that a number of checks to contractors were bouncing as a result.